

BEFORE THE POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Competitive Product Prices
Parcel Select Contract 44

Docket No. MC2021-42

Competitive Product Prices
Parcel Select Contract 44 (MC2021-42)
Negotiated Service Agreement

Docket No. CP2021-43

**PROPOSED REPLY OF STRATEGIC ORGANIZING CENTER TO
RESPONSES IN OPPOSITION TO SOC REQUEST FOR ACCESS TO
NON-PUBLIC MATERIALS UNDER PROTECTIVE CONDITIONS**
(September 2, 2022)

The Strategic Organizing Center (SOC) hereby replies to the responses of Amazon.com Services LLC (Amazon), the United States Postal Service (Postal Service or USPS), and the Parcel Shippers' Association (PSA) (collectively the Responses)¹ filed on August 22, 2022 opposing SOC's motion of August 17, 2022, requesting access to the non-public sections of Parcel Select Contract 44 (Contract or Contract 44) and the accompanying Governors' Decision for its counsel to use in aid of initiating a proceeding before the Commission.

Procedural Background

SOC's Motion was filed pursuant to the Postal Regulatory Commission's (PRC or Commission) Order No. 6189, which addressed SOC's May 12, 2022 Motion (May 12,

¹ This motion refers to Amazon, the Postal Service and the PSA collectively as "Respondents."

2022 Motion) filed in Docket No. CP2021-117, seeking access to the non-public sections of the main current Negotiated Service Agreement (NSA) between USPS and Amazon and the accompanying Governor's Decision.

In that Order, the Commission denied SOC's May 12, 2022 Motion without prejudice, suggesting that it had not been filed within the correct docket. The Order further directed SOC and USPS to meet and confer to narrow the differences between them and to submit a Joint Statement on the results of this process. It also granted SOC leave to refile a Motion for Access within the correct dockets following the submission of the Joint Statement.

On August 5, 2022, SOC and USPS filed the requested Joint Statement in Dockets MC2021-115 and CP2021-117, and on the same day SOC filed a Supplemental Submission in these dockets requesting immediate access to the requested documents on the grounds that USPS waived objections to SOC access because it failed to meaningfully meet and confer as ordered by the Commission (SOC Submission, filed herewith). On August 17, 2022, SOC filed a renewed Motion for Access within what it now believes to be the appropriate dockets, Docket Nos, MC2021-42 and CP2021-43 (August 17, 2022 Motion). On August 22, 2022, Amazon, USPS and the PSA filed Responses opposing SOC's August 17, 2022 Motion. SOC has filed a motion requesting leave to file the instant, accompanying Proposed Reply.

Argument

SOC seeks access to the key contract governing the Postal Service's most important relationship with a private business to gain information about a potential

violation of the laws governing the Postal Service. SOC's request advances, therefore, the core purpose underlying the Commission's rules on access to information: that is, promoting "accountability, transparency, and oversight of the Postal Service"² by enabling meaningful public contributions to and participation in the Commission's oversight activities.

Respondents, in contrast, seek to subvert this core purpose. Every argument advanced by Respondents attempts to negate, in effect, public participation in accountability and oversight of the Postal Service, in spite of the role accorded to such participation in the regulatory scheme adjudicated and approved by the Commission.

Moreover, Respondents oppose SOC's request based on arguments that are legally and factually demonstrably false. Thus, contrary to Respondents' claims, the relevant Commission rules plainly *permit* access to non-public material in aid of initiation of a complaint; case precedent and relevant statutory language *do not* insulate USPS decisions to favor particular customers from the Commission's review; and the Commission *has not already* considered and denied the claims against USPS which SOC is considering filing. Further, granting access to the materials *will not* foreseeably cause serious commercial harm to USPS; and the Commission *may* take into account the impact of USPS's business relationship with Amazon on the Postal Service's statutory obligations to prioritize letter mail and provide effective service to rural communities when deciding whether this relationship creates "undue" preferences; and SOC *has* properly disclosed its relevant affiliations.

² Dockets MC2021-2115 and CP2021-117, Commission Order No. 6189 at 11.

Because Respondents' basis for opposing SOC's request is both incorrect and inimical to the regulatory scheme that governs the relationships among Respondents, SOC urges the Commission to reject their arguments and grant its August 17, 2022 Motion.

1. PRC Rules plainly permit access to non-public materials in aid of initiation of a complaint before the Commission.

Contrary to Respondents' arguments, the Commission has repeatedly rejected the contention that Commission rules do not permit access to non-public materials in aid of initiating complaints before the PRC. In its Response, Amazon argues that the regulatory history of Rules 39 C.F.R. § 3011.300(c) and § 3011.301(b)(2)(ii) shows that the rules cannot be construed as permitting grant of access to non-public information in aid of initiation of a complaint to the Commission.³ Amazon's position restates an argument already made by USPS and rejected by the Commission; this argument therefore does not provide grounds for denying SOC's motion.

Rule § 3011.300(c) states without qualification that the PRC may grant access to non-public materials for the purpose of "aiding the initiation of a proceeding before the Commission." In spite of this plain language, Amazon argues that the Commission intended to exclude complaints from the term "proceeding" because the Notice of Proposed Rulemaking (NPRM) stated that the Rule was intended to be consistent with past practice, and the example of past practice cited was not a proceeding involving the filing of a complaint under Section 3662 of the type that SOC is contemplating.⁴

³ Amazon Response at 6-9.

⁴ *Id.* at 6 (citing Docket No. RM2018-3, Notice of Proposed Rulemaking Relating to Non-Public Information (Feb. 13, 2018) at 22 (Order No. 4403)).

Amazon fails to recognize that, in its comment on the 2018 NPRM, USPS similarly argued that the scope of the Rule should be limited to the particular type of proceeding mentioned in the same supporting example.⁵ USPS argued that if access could be granted for the sole purpose of initiating a new proceeding, “persons with only a vague, undeveloped proposal for the initiation of a new proceeding [could] obtain access to commercially sensitive, non-public materials by providing only limited justification”⁶ and therefore proposed that the language “or aiding the initiation of a proceeding before the Commission” be deleted from the final Rule.⁷

In its Order issuing the final rule, the Commission declined to make this change, concluding that the Rule’s procedural requirements – including the detailed supporting justification, the certification of compliance with protective conditions, and the opportunity to object afforded to affected parties – are sufficient to address the Postal Service’s concerns.⁸ Thus the Commission rejected USPS’s position that the precedent cited in the NPRM did not support granting access for the sole purpose of initiating a new proceeding. USPS’s 2018 argument differed from Amazon’s only in that it sought to limit the scope of the Rule to existing rather than new proceedings (including new complaints), whereas Amazon seeks to limit the scope of the Rule to proceedings other than complaints. But whereas USPS at least requested that the PRC revise the language to expressly reflect USPS’s interpretation of the Rule’s proper scope, Amazon

⁵ Docket No. RM2018-3, USPS Initial Comment (Mar. 23, 2018) at 5.

⁶ *Id.* at 6.

⁷ *Id.* at 8.

⁸ Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information (June 26, 2018) at 28-29 (Order No. 4679).

makes the more startling claim that the PRC intended the Rule's scope to be defined by the supporting example rather than its plain wording.

The absurdity of Amazon's claim that the PRC somehow silently excluded complaints from its definition of "proceeding" is further underlined by the PRC's express inclusion of "complaints" in the comprehensive list of docket designations included in the section of the NPRM describing how the Rule harmonized procedures for accessing non-public materials for various types of proceedings.⁹ Had the PRC intended to exclude complaints from the Rule's coverage, this would surely have been an appropriate moment to have informed the public.

In short, Amazon would have the Commission accept the strange proposition that when it used the most general term available to describe the application of the Rule to its oversight activities involving public participation, i.e., "proceeding," it intended to exclude one key type of proceeding – complaint – from the Rule's coverage, while obscuring that fact from the public even while its list of proceedings expressly includes "complaint." Because the rules plainly contemplate that a complaint is valid grounds for seeking access to non-public materials, the Commission should reject this argument.

2. Amazon's assertion that discovery during a proceeding is the sole means of public access to information conflicts with the governing Rules and regulatory scheme.

Amazon argues that applying the Commission's access rules to aiding initiation of complaints conflicts with 39 U.S.C. § 3662, Commission rules for public complaints filed pursuant to the statute,¹⁰ and with the Federal Rules of Civil Procedure (FRCP).

⁹ Order No. 4403 at 23.

¹⁰ Amazon Response at 9-11 (citing 39 C.F.R. § 3022).

Amazon's argument fails because it ignores the plain language of the rules and interprets them in light of extraneous policy concerns rather than the plain language of the rules and the expressed views of the Commission.

Amazon claims that because 39 U.S.C. § 3662(b)(1)(A)(i) provides that the Commission shall "begin proceedings on [a] complaint" "upon a finding that [the] complaint raises material issues of fact or law," the statute prohibits any grant of access to information regarding potential violations of Section 3662 unless the Commission has found that a complaint already submitted to it raises such issues.¹¹ Amazon further argues that permitting SOC to request access to non-public materials in aid of initiation of a complaint is "inconsistent" with the FRCP's prohibition on pre-complaint discovery.¹²

Amazon's arguments should be rejected. In the first place, Section 3662 is entirely silent regarding access to information and certainly contains no limitations on such access. By contrast, the statutory provision which authorizes 39 C.F.R. § 3011.300(c) and § 3011.301(b)(2)(ii), that is, 39 U.S.C. § 504(g)(3)(A), expressly authorizes the Commission to "disclos[e] relevant information in furtherance of its duties under this title" subject to duly issued regulations.

Second, a Section 3662 proceeding is not, as Amazon characterizes it, "litigation" involving a civil dispute between independent parties but rather an administrative determination conducted in the public interest regarding the compliance of a public agency with its legal obligations. In such proceedings the Commission itself, rather than the parties in dispute, is responsible for securing the information needed to decide the

¹¹ *Id.* at 9-10.

¹² *Id.* at 10-11.

case.¹³ Under this scheme, it is entirely reasonable for the PRC to provide potential complainants with “meaningful opportunit[ies]” to secure access to the information they need to properly inform the Commission’s decision as to whether to initiate oversight proceedings that are not available to civil litigants in the federal courts. The PRC does in fact provide for access to information in aid of other types of proceeding and has given no indication that it excludes complaints from this general policy.

Third, Amazon’s contention that interpreting the PRC’s access rules as permitting access to information in aid of initiating a complaint is improper because it would render them “inconsistent” with the FRCP fails for the same reason. The FRCP govern litigation, not an administrative proceeding before an oversight agency governed by rules set by that agency. The Commission is not generally legally required to base its procedural rules upon the FRCP, except in the specific context of deciding whether the interests of the party seeking access to information outweigh those of the party seeking to deny access, and with this limited exception has not in fact done so.¹⁴ The PRC should reject Amazon’s invitation to reinterpret the Commission’s rules of procedure in light of a body of rules neither legally applicable nor practically relevant to, its proceedings.

¹³ See Rule 39 C.F.R. § 3022.20 “Sufficiency of Information.”

¹⁴ 39 U.S.C. § 504(g)(3)(B) requires the Commission to base rules for “ensuring appropriate confidentiality for information furnished to any party” on FRCP 26(c). Accordingly, Rule 3011.301(e) provides that “in determining whether to grant access to non-public materials, the Commission shall balance the interests of the parties consistent with the analysis undertaken by a Federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).” This is the only context in which the FRCP is referred to in the Commission’s Rules of Procedure. 39 C.F.R. §§ 3010.100 *et seq.*

3. SOC's potential complaint that USPS may unduly favor Amazon packages is viable under Section 403(c) because USPS's authority to favor particular businesses is not unlimited or unreviewable.

Amazon argues that SOC has not advanced a potentially valid claim of preferencing or discrimination under Section 403(c) on the grounds that (1) 39 U.S.C. § 3632(b)(3) authorizes the Postal Service to offer rates and terms “not of general applicability” to individual customers, (2) courts and the Commission “regularly defer to . . . its business judgment in such matters,” and (3) Section 403(c) “prohibits only ‘undue or unreasonable’” discrimination, not discrimination generally.¹⁵

Although Amazon is correct that the law permits the Postal Service to offer terms to customers that are not generally applicable to all customers, it is also true, as Amazon acknowledges, that the Postal Service is not permitted to discriminate “unduly” or “unreasonably” among customers. SOC does not contemplate alleging that USPS’s treatment of Amazon violates Section 403(c) simply because it is preferential, but rather because it is *unduly* preferential because, for instance, USPS management puts more pressure on staff to meet contractually agreed delivery targets for Amazon than it does to meet service standards for other types of mail, to the detriment of the latter.¹⁶ Further, although court and Commission decisions do not clearly delineate what constitutes undue preferencing or discrimination, it is clear that they do consider some types or degrees of preferential treatment to be unlawful.¹⁷ SOC seeks sufficient information, including the unredacted terms of Contract 44, to determine whether the degree and

¹⁵ Amazon Response at 12-13. PSA makes a similar argument. PSA Response at 3.

¹⁶ August 17, 2022 Motion at 8.

¹⁷ See *Gamefly, Inc. v. Postal Regulatory Comm’n*, 704 F.3d 145, 148 (D.C. Cir. 2013); *Nat’l Easter Seal Soc’y v. USPS*, 656 F.2d 754, 760-62, (D.C. Cir. 1981).

type of preferencing enjoyed by Amazon could reasonably be found to be “undue” under Section 403(c). Thus, SOC states a potentially cognizable claim under the regulation.

In short, Amazon is arguing that USPS’s exercise of its business judgment in its dealings with individual customers is effectively unreviewable. But as the plain terms of Section 403(c) make clear, the Postal Service’s ability to treat customers differently is not boundless. Therefore, Amazon’s argument that SOC has failed to advance a potential violation of Section 403(c) should be rejected.

4. SOC seeks to evaluate contract terms in light of reports of actual instances of undue preferencing, issues not addressed by the Commission’s review process.

SOC is not, as the Responses claim, seeking to “second guess” the Commission’s initial approval of the Contract or its consideration of the Contract within its annual compliance review process.¹⁸

First, there is an essential difference between determining that the Contract is lawful purely on its face – as the Commission has done – against whether, in light of additional factual information regarding USPS’s actual administration of the Contract, its terms may enable or incentivize USPS to unduly preference Amazon deliveries to the detriment of other mail. As stated in the August 17, 2022 Motion, SOC has received reports from numerous Postal Service employees that preferencing is indeed occurring,¹⁹ information that was presumably unavailable to the Commission at the time it approved the Contract.

¹⁸ Amazon Response at 14; USPS Response at 2; PSA Response at 3.

¹⁹ August 17, 2022 Motion at 8.

In addition, while the Commission's FY 2021 Annual Compliance Determination discusses the negative impact of the "surge in package volume" and "offloads by private companies" on service performance, it does not address the specific contribution that the Postal Service's administration of its NSA with Amazon may be making to these problems or whether, if USPS is prioritizing its obligations under that Contract over its other service delivery targets, doing so could constitute *undue* preferencing under Section 403(c).²⁰ Thus SOC's potential complaint addresses issues not previously considered or resolved by the Commission.

5. The Respondents' claim that granting access to the materials will cause commercial harm to USPS is speculative and overstated.

Respondents contend that granting SOC's request will likely cause USPS to lose the custom of its commercial partners because they will prefer to contract with private businesses that are not subject to equivalent transparency requirements.²¹ In reality, however, USPS maintains a de facto monopoly over last-mile delivery services in low-density geographies – a monopoly that not only Amazon, but also USPS's major direct competitors UPS and Fedex pay to access.²² The proposition that these companies would sever their business ties with USPS and either give up servicing rural markets or spend billions of dollars replicating USPS's infrastructure within them because of concerns over business confidentiality is at best speculative and should therefore be

²⁰ Docket No. ACR2021, Annual Compliance Determination (March 23, 2022) at 117.

²¹ USPS Response at 4-5; PSA Response at 2-3.

²² See, e.g., Barry Hochfelder, *Why USPS Is The Perfect Fit For The Last Mile*, SUPPLY CHAIN DIVE, (Sept. 7, 2018), <https://www.supplychaindive.com/news/USPS-postal-service-deliveries-logistics/531785/>.

accorded little weight when balanced against the public interest in scrutiny of these business relationships.²³

Relatedly, USPS's claim that granting SOC's request will open the floodgates to numerous frivolous and malicious access requests is unduly alarmist, as the PRC has already in effect found. According to USPS: "Any party with a disagreement, postal or nonpostal, against any known or suspected Postal Service NSA customer could come before the Commission, hint at a potential complaint, and seek to pry into certain of the alleged NSA customer's trade secrets."²⁴ This argument simply restates USPS's claim that the proposed rule in 2018 would allow "persons with only a vague, undeveloped proposal for the initiation of a new proceeding [could] obtain access to commercially sensitive, non-public materials by providing only limited justification."²⁵ As discussed above, the PRC rejected this argument in 2018,²⁶ and it has reiterated this rejection and the reasons for its position in Order 6189.²⁷

6. The possibility that USPS has violated its obligations to prioritize letter mail and rural communities is relevant to the question of whether USPS may be engaging in "undue" preferencing in violation of Section 403(c).

The Responses also complain that under 39 U.S.C. § 3662, the Commission does not have independent jurisdiction over potential allegations that, if USPS is

²³ See, e.g., Docket No. ACR2018, Order Issuing the Determination to Unseal Library Reference PRC-LR-ACR2-18-NP3 (July 12, 2019) at 44 (Order No. 5151) (refusing USPS request to accord non-public treatment on the grounds, among others, that USPS claims of commercial harm were "speculative at best").

²⁴ USPS Response at 4.

²⁵ USPS 2018 Comment at 6.

²⁶ See discussion of Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information (June 26, 2018) at 28-29 (Order No. 4679) at page 2, above.

²⁷ Order No. 6189 at 9-11.

impermissibly preferencing Amazon deliveries, USPS may also have violated 39 U.S.C. § 101(b) and § 101(e). These provisions the Postal Reorganization Act of 1970, which set out Congress’s basic policy goals for the Postal Service, require USPS to prioritize letter mail and to provide effective service to rural communities. While it is true that the Commission does not have direct jurisdiction to enforce these requirements, statutory provisions – and the policy mandates underlying those provisions – setting out requirements as to how and whether certain types of mail must be handled and even prioritized by USPS are surely relevant to the substantive question of whether Amazon mail is being “unduly” or “unreasonably” preferred. Thus, SOC respectfully urges the Commission to take these Congressionally mandated policy priorities into account in determining the unsettled question of what constitutes “undue” preferencing under Section 403(c), and accordingly to grant SOC access to the requested documents in order to aid SOC’s analysis of whether the relationship between USPS and Amazon is undermining these statutory mandates and policy goals.

7. SOC properly disclosed its role as a not-for-profit advocate rather than as an “industry affiliate.”

The Commission should reject USPS’s argument that it should summarily dismiss SOC’s Motion on the ground that SOC failed to properly disclose its “relevant affiliations . . . with the delivery services, communications or mailing industries” as required by Rule § 3011.301(b)(3)’s itemization of the required contents for a Motion for Access.²⁸

²⁸ USPS Response at 3-4 (citing Rule § 3011.301(b)(3)).

USPS claims that SOC's relationship with a labor union that represents and organizes employees of other firms within the delivery services industry constitutes an "industry affiliation" within the meaning of Rule 3011.301(b)(3). USPS further contends that SOC has impermissibly failed to disclose this affiliation and should therefore be denied access to the requested materials on that basis alone.

As an initial matter, USPS raised a similar argument in its Response to SOC's May 12, 2022 Motion,²⁹ which the Commission declined even to mention in its responsive Order.³⁰

In any case, this position posits a false equivalency between providing labor representation for employees within an industry and competing for profit against other firms within that industry, a position for which USPS provides no precedential support.

Rather, the disclosure requirements of Commission Rule § 3011.301(b)(3) should be read in conjunction with Rule § 3011.300(b)'s provision that "[n]o person involved in competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials shall be granted access to non-public materials." That Rule further specifies that "[i]nvolved in competitive decision-making includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals." The Rule goes on to specify that competitive decision-making "does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity

²⁹ USPS Response to May 12, 2022 Motion at 2, n.4.

³⁰ Order No. 6189.

having a proprietary interest in the protected material.”³¹ This list of competitive decision-making activities clearly includes activities arising from competition between rival businesses, while omitting activities arising from the labor-management relationships, showing that it was only the former type of relationship that Rule § 3011.301(b)(3) addresses.

Second, contrary to USPS, SOC has not attempted to conceal its relationship with unions that actively represent, organize, or advocate for workers in industries relevant to USPS. SOC’s August 17, 2022 Motion included a hyperlink to SOC’s website on which SOC’s union affiliations are clearly disclosed.³²

Finally, as a matter of past practice, the Commission has granted access to non-public information under protective conditions over USPS objections even to USPS’s key commercial competitors like UPS.³³ Thus SOC’s non-commercial relationship with labor unions active in the industry should not disqualify it from access.

Conclusion

SOC recognizes that its request for access to these materials raises fundamental issues regarding the Postal Service’s obligations as a public institution that deals with private companies and which in certain respects is required to behave like one. However, USPS is also empowered, regulated, and historically resourced by the federal government. In many respects it is legally sheltered from private-sector competition, and the geographic reach and density of its delivery infrastructure is unrivalled, thanks to

³¹ Rule 39 C.F.R. § 3011.300(b) (emphasis added).

³² SOC August 17, 2022 Motion at 12. This section of the Motion provides a hyperlink to SOC’s website, on which SOC’s affiliations with particular unions are clearly disclosed.

³³ See, e.g., ACR2018 Order No. 4998 - Order Granting Motions for Access (Feb. 8, 2019).

many generations of public investment and legal protection. Meanwhile Amazon has become USPS's largest – and perhaps its most indispensable – business partner. Given the risk that Amazon has used its exceptional bargaining strength vis a vis USPS to secure privileged access to the Postal Service's last-mile delivery infrastructure to the detriment of the Postal Service's other users, SOC submits that, to quote Commission Order 6189 rejecting the Postal Service's request to dismiss SOC's earlier motion with prejudice, "in furtherance of the Commission's overall goal of providing accountability, transparency, and oversight of the Postal Service," the Commission should subject this business relationship to the public and legal scrutiny available under Section 403(c).

To that end, SOC urges the Commission to ensure that its oversight activities – including review of the type of complaint SOC is considering submitting – are informed to the maximum permissible degree by relevant evidence, analysis, and argument from interested third parties. SOC therefore respectfully requests the Commission to reject the Respondents' opposition to this Motion and grant SOC access to the full text of Contract 44 under the appropriate Protective Conditions.³⁴

DATED September 2, 2022

THE STRATEGIC ORGANIZING CENTER

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³⁴ SOC does not waive its right to assert additional grounds for it being granted access to information under protective conditions from the Commission.

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